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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, vs. COUNTY OF ELKO, Defendants, THE WILDERNESS SOCIETY and GREAT OLD BROADS FOR WILDERNESS, Intervenors and Cross-Claimants,	3:99-CV-547-MMD-WGC **ELKO COUNTY'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT**

Comes now, Elko County, Nevada, by and though its attorneys, the Elko County District Attorney's Office and Gary D. Woodbury and responds to the Motion for Summary Judgment filed on December 12, 2016 filed by Intervenors and Cross-Claimants, The Wilderness Society and the Great Old Broads for Wilderness.

The Intervenors' Motion for Summary Judgment seeks a final judgment as to Intervenors' claims under the Administrative Procedure Act and as to Elko County's Quiet Title Counterclaim against the United States.

Elko County is a party in the Quiet Title Action, but is not formally a party in the Cross Claims of Intervenors against the United States. This Response is made and based on the Points and Authorities set out below.

Dated this 31st day of January, 2017.

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POINTS AND AUTHORITIES IN RESPONSE TO MOTION FOR SUMMARY JUDGMENT

PRELIMINARY MATTERS

Elko County recognizes that the Court's factual analysis of the evidence and its conclusions of law set out in the August 16, 2016 Order of the Court (DKT 600) are final for purposes of contesting the present motion for summary judgment; as is the Court's decision on the threshold legal issues filed in August, 2014. (DKT 507). Based on that legal reality, Elko cannot properly dispute those decisions, or attempt to persuade the Court to allow relitigation of the Court's previous findings of fact and conclusions of law, and decisions in this brief.

Those previous findings and conclusions of the Court, however, do not specifically address whether the Settlement Agreement standing alone is invalid. If the Court intended to void the Settlement Agreement whether it was part of a proposed Consent Decree or standing alone was not made explicit.

Elko's failure to contest the Court's prior decisions is not an acknowledgment that Elko concedes the Court's analysis and conclusions were correct on either the facts or the law.

As a collateral matter, this Court held in its Order regarding threshold issues, at page 5, (DKT 507), that Elko County did not appear to contend in its briefing that, absent proof Elko owned a right-of-way in the South Canyon, the Court couldn't approve the Consent Decree. Elko County categorically denies that was ever its position and alleges that it has never submitted any document or made any statement to this Court or anyone else that is to the contrary of that denial.

In a footnote on page 16 (DKT 605) Intervenors invite the Court to re-decide whether Nevada law permitted public use as a means to establish a right of way under R.S. 2477. The Court made no mention in its decision whether the question ought to be certified to the Nevada Supreme Court for an answer pursuant to Nevada Law even though the adverse parties didn't oppose it. In its amicus brief, the Nevada Attorney General's Office suggested that public use is sufficient in Nevada to accept and R.S. 2477 right-of-way, and that certifying the question to the Nevada Supreme Court would provide help settling some of the major legal issues in this case. (DKT 543). The Court did not choose to do so.

Intervenors also suggest that the Court should reconsider whether the lands in and around South Canyon were reserved for public use prior to 1909. Elko County objects to this request.

STANDARD OF REVIEW JUDICIAL REVIEW UNDER THE APA

A court reviewing an agency decision under section 702 of the Administrative Procedure Act (APA) holds the agency's decision to the arbitrary and capricious standard. Unless the agency's decision is arbitrary and capricious the court must affirm it. "An agency's action is arbitrary and capricious if the agency fails to consider an important aspect of a problem, if the agency offers an explanation for the decision that is contrary to the evidence, if the agency's decision is so implausible that it could not be ascribed to a difference in view or be the product of agency expertise, ... or if the agency's decision is contrary to the governing law." Lands Council v. Forester of Region One of the United States Forest Serv., 395 F.3d 1019, 1026 (9th Cir. 2005). The court's review is generally limited to the administrative record. Id. at 1029. However, in certain circumstances the Court can consider evidence outside the administrative record. A district court is "permitted to admit extra-record evidence: (1) if admission is necessary to determine 'whether the agency has considered all relevant factors and has explained its decision,' (2) if 'the agency has relied on documents not in the record,' (3) 'when supplementing the record is necessary to explain technical terms or complex subject matter,' or (4) "when plaintiffs make a showing of agency bad faith.'" Id. at 1030 (*citing* Sw. Ctr. for Biological Diversity v. United States Forest Serv., 100 F.3d 1443, 1450 (9th Cir. 1996)).

Extra-record evidence is not generally permitted, and the exceptions are construed and applied narrowly, to prevent courts from proceeding "de novo rather than with the proper deference to agency processes, expertise, and decision-making." Id. at 1030. Agencies are entitled to rely on their own expertise and are free to disagree with other stakeholders. Idaho Conservation League v. Thomas, 91 F.3d 1345, 1349 (9th Cir. 1996). This agency expertise concerning complex technical subjects is entitled to deference by a reviewing court, even if a court finds a contrary view more persuasive. Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 378, 109 S. Ct. 1851, 1861 (1989).

ARGUMENT

1. Voiding the Settlement Agreement Will Not Terminate This Lawsuit

Intervenor's brief properly states that this Court's August 16, 2016 decision concluded that it could not approve the Consent Decree proffered by the United States and Elko County, because Elko County had failed to establish the existence of an R.S. 2477 right-of-way for the South Canyon Road. Intervenors argue that the Settlement Agreement that incorporates the Consent Decree relinquishes federal real property rights contrary to applicable federal law.

Intervenors then state there are only two remaining matters for the Court to resolve to bring this "long running case to a conclusion." Those issues are deciding TWS' cross-claims under the Administrative Procedure Act and deciding the status of Elko County's Quiet Title Counterclaim. This assertion is incorrect. If the Court voids the Settlement Agreement in its entirety it will create or re-establish other issues that remain in this litigation. Elko County has expended hundreds of thousands of dollars to defend the Settlement Agreement and similar amounts of money and resources to perform obligations required under the agreement. Both Elko and the United States have remaining obligations under the Settlement Agreement as well.

This Court's August 16, 2016, decision, if it voided the Settlement Agreement and not just the Consent Decree, removed a significant portion of the consideration that Elko County received from the United States in the Settlement Agreement. The Agreement contains a severance provision allowing the remaining terms of the Agreement to remain in effect if a portion of the agreement is found invalid or unenforceable, but only if severance is equitable. (DKT 118 at page 9.) Elko County will been deprived of a majority of the benefit of the Settlement Agreement by the Court's decision, and since Elko have performed its obligations, severance is not equitable.

Additionally, Section IX of the Settlement Agreement provides for dispute resolution between the United States and Elko County through mediation. That provision was included to protect Elko County from becoming a party to administrative proceedings where its only remedy in the face of an adverse decision by the federal government was to prove that the federal government had acted arbitrarily or capriciously. That benefit to Elko County will be lost if the Court voids the Settlement Agreement in its entirety.

Settlement agreements operate like contracts between parties. Collins v. Thompson, 679 F.2d 168, 170 (9th Cir. 1982). Contract principles also apply to the interpretation of consent decrees. *Id.* So the Settlement Agreement acts as a contract between the United States and Elko County. The United States has done little to defend its contract with Elko County; indeed it has essentially sought to undermine the Settlement Agreement at least since 2008. If the Intervenors are correct in their recitation at page 2 of its argument in support of its Motion for Summary Judgment that the United States agrees that the Settlement Agreement is void regardless of whether it exists alone or as a part of a consent decree then the United States is in violation of its contractual obligations.

If this Court decides that the Settlement Agreement is void only insofar as it purports to transfer an R.S. 2477 right-of-way, but valid as to the remainder, that decision not only withdraws significant consideration from Elko County, it will continue the lawsuit. The Court will not be in a position to certify its decision for an intermediate appeal because a decision by an appellate court will not likely terminate the litigation. NRAP 54(b).

2. Burden of Proof of the R.S. 2477 Claim

Elko County has a particular problem with the assertion that proof of a valid R.S. 2477 claim should be construed against Elko County and that the standard of proof is clear and convincing evidence. Neither Adams v. United States, 3 F.3d 1254, 1258 (9th Cir. 1993), nor the Supreme Court in United States v. Union Pacific R.R. co., 353 U.S. 112, 116 (1957), nor United States v. Gates of the Mountains Lakeshore Homes, Inc, 732 F. 2d 1411, 1413 (9th Cir. 1984), applied the clear and convincing standard to establish the validity of a right-of-way. These cases concerned the scope of an R.S. 2477 right-of-way.

The rule requiring public grants to be construed against the grantees is modified when it interferes with the intent of Congress. Leo Sheep Co v. U.S., 440 U.S. 668, 682-683 (1979).

See also Humboldt County v. United States, 684 F. 2d 1276, 1281-82. (9th Cir. 1982). The Supreme Court has observed that R.S. 2477 was enacted to encourage roads as "necessary aids to the development and disposition of the public lands," recognizing that their maintenance was "clearly in furtherance of the general policies of the United States." Central Pac. Ry. v. Alameda County, 284 U.S. 463, 472—73, (1931). The obvious intent of Congress in 1866 was to allow creation of the easements without any formal acts. This is in line with the 9th Circuit Court of Appeals' holding that "[l]ongstanding custom and usage of a community is not irrelevant to a sensible application of environmental law." Great Old Broads for Wilderness v. Kimbell, 709 F.3d 836, 852 (9th Cir. 2013). The 9th Circuit also pointed out that "the South Canyon Road had been sited in the floodplain for years before the area was added to the national forest system..." Id.

The clear and convincing evidentiary standard referred to in San Juan County v. United States, 754 F. 3d 787 (10th Cir 2014) resulted from the Utah District Court rejection of Utah statutory law specifically on point and adoption of case law more or less on point concerning proving a public right-of way against private owners. However, Nevada has no case law on those subjects. Whether the clear and convincing standard of proof applies in litigation of ownership rights in Nevada is unsettled.

3. There Are Errors In Intervenors' Recitation Of Material Facts, As Well As Facts That Are In Dispute

On pages three through six of their brief in support of the Motion for Summary Judgment, Intervenors have set out what they identify as a Statement of Undisputed Material Facts. Presumably, material facts would go directly to the question of whether Summary Judgment is warranted on the APA claims and whether the Court ought to invalidate Elko's Quiet Title Counter Claim. A material fact is one which might affect the outcome of the case under governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A significant portion of the facts recited seem to be aimed at manipulating what it perceives the Court's political point of view about the citizens and government of Elko County to be; as well as what Intervenors deem to be the anti-environmental position of Elko County in the lawsuit.

Intervenors are seeking through their recitation of undisputed material facts provided to intensify the Court's negative views by providing irrelevant and contested facts.

For example, whether the Elko County Commission decided the day after the 2000 presidential election (won by a Republican) to not approve an initial proposed settlement agreement, as stated in paragraph 8, is entirely irrelevant to any issue before the Court in the Motion for Summary Judgment. Similarly, whether Elko County Manager George Boucher was present or absent at a County Commission meeting when the county road crew was directed by Commissioners to rebuild the road as alleged in paragraph 5, and whether or not Elko County Commissioners received legal advice about the evidence supporting an R.S. 2477 road as alleged in paragraph 6, are equally irrelevant to any issue now before the Court.

A number of additional "undisputed material facts" are equally irrelevant and are by no means undisputed. For example, Intervenors have never alleged in their pleadings that a disclaimer occurred. (DKT # 141 and #151), and have argued that a disclaimer did not occur. (DKT 156). Paragraph 10 is therefore disputed.

Elko County requested the 2015 evidentiary hearing after the Court had ruled that it must prove the existence of the R.S. 2477 right-of-way by clear and convincing evidence. (DKT 503). Additionally, Elko County was also not allowed to present its "full case," as alleged in paragraph 13. By Court order, Elko County was forbidden to present evidence bearing on the ownership issue that occurred after 1920. (DKT 553). Elko County notes as well that in its August 11, 2014, order at page 4, (DKT 507) the Court informed the parties that it would be absurd for the Court to even consider approving the Consent Decree when the United States and Elko County didn't agree "to commit to a unified description of the rights conferred with respect to South Canyon Road." Because the United States and Elko County did not provide such a unified description, Elko County was aware the Court was not going to approve the Consent Decree well before the evidentiary hearing.

4. The Department Of Justice Has Plenary Discretion To Settle This Lawsuit

Intervenors claim that there are only two federal procedures available to relinquish federal real property: Under the procedures established under the Federal Land Policy

Management Act, or by way of a disclaimer under the Quiet Title Act. Intervenors also argue that the agreement violates NEPA, as well as Forest Service Regulations. The second argument of Intervenors for summary judgment on the APA claims is that the Department of Justice was arbitrary and capricious in entering into the Settlement Agreement because the decision to do so was contrary to the evidence in the administrative record.

Elko County was not present for the legal and factual analysis by the Department of Justice prior to entering into the Settlement Agreement. It seems clear the Department of Justice initially relied on the analysis of Ms. Wilson and Mr. Frampton concerning historical aspects of the Jarbidge area. (U.S. Exhibit 710). As the Court and Intervenors have interpreted the Settlement Agreement, it appears the Department of Justice ignored the conclusions of its historians.

Elko County argues the Department of Justice has plenary discretion on how it settles law suits; and because the Department of Justice represented no specific agency of the federal government in this case, it was not obliged to follow FLPMA, NEPA, or any other federal rules governing the Forest Service, the Bureau of Land Management, or the Department of the Interior. Because it did not represent any specific agency, it follows that the Department of Justice is not bound by the same regulations and statutes agencies are. Intervenors fail to cite any specific federal statute or federal rules the Department of Justice violated by entering into the Settlement Agreement.

The Court, at page 39 of the August 16, 2016 order, identified the violation as being of "applicable law and policy". In its Order regarding Threshold Legal Issues, in a footnote on page 2, the Court declined to address what laws were being violated by the Department of Justice because of what it termed Elko County's "oversimplified framework." However, no specific federal statutes or rules have been cited.

In 1996, Congress clearly and expressly forbade the Bureau of Land Management, as well as the United State Forest Service from involving themselves in rule making about R.S. 2477 easements. The Bureau of Land Management, and by reasonable implication the United

States Forest Service, have never been involved in administratively determining the validity of ownership of R.S. 2477 rights-of-way. The 10th Circuit noted that:

> No final rule or regulation of any agency of the Federal Government pertaining to the recognition, management, or validity of a right-of-way pursuant to Revised Statute 2477 (43 U.S.C. [§] 932) shall take effect unless expressly authorized by an Act of Congress subsequent to the date of enactment of this Act [Sept. 30, 1996], U.S. Department of the Interior and Related Agencies' Appropriations Act, 1997, § 108, enacted by the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009(1996). Southern Utah Wilderness Alliance v. BLM, 425 F. 3d 735, 755 (10th Cir. 2005).

As a general proposition, the unreviewable discretion of the Department of Justice to conduct and make decisions in litigation in which the United States is a party is essentially unlimited so long as it does not violate federal law, Executive Business Media, Inc v. U.S. Department of Defense, 3 F. 3d 759, 761 (4th Cir 1993). The 9th Circuit Panel in this case adopted the holding of Executive Business that Department of Justice discretion stops short of settling litigation in a way that violates federal law. CF Also Arroyo v. Solomon & Solomon, P.C., 2001 U.S. Dist. LEXIS 12180 (E.D. NY 2001), Shoshone-Bannock Tribes v. Reno, 56 F.3d 1476 (DC Cir. 1995).

Power to release or otherwise dispose of the rights and property of the United States is lodged in the Congress by the Constitution. Art. IV, § 3, Cl. 2. Subordinate officers of the United States are without that power, save only as it has been conferred upon them by Act of Congress or is to be implied from other powers so granted. Whiteside v. United States, 93 U.S. 247, 256-257; Hart v. United States, 95 U.S. 316, 318; Hawkins v. United States, 96 U.S. 689, 691; Utah Power & Light Co. v. United States, 243 U.S. 389, 409; Wilber National Bank v. United States, 294 U.S. 120, 123-124cf. United States v. Shaw, 309 U.S. 495, 501; Ritter v. United States, 28 F.2d 265; United States v. Globe Indemnity Co., 94 F.2d 576.

The United State Congress drafted and passed both 43 U.S.C. 2409a and 28 USC 516 - 519. It is incomprehensible the United States Congress did not realize that in giving plenary discretion to the Department of Justice to conduct litigation, including litigation under the Quiet Title Act, that sooner or later a case would arise in which the Department of Justice would find reason to settle the case without completely litigating contested facts of ownership. In support of this conclusion is the principle that Congress is presumed to know what it is doing when it writes and passes legislation, Bedroc LTD, LLC v. United States, 541 U.S. 176 (2004).

The conclusion must be that Congress has impliedly granted authority and discretion to the Department of Justice to dispose of existing federal interests in real property when litigating quiet title actions against the United States. Congress also knew from existing case law that in giving the Department of Justice plenary discretion during litigation that the Courts had uniformly held that discretion included the power to make erroneous decisions as well as correct ones. United States v. San Jacinto Tin Co., 125 U. S. 273, 278-280, 8 S. Ct. 850, 31 L. Ed. 747; Noble v. Union River Logging R. R. Co., 147 U. S. 165, 13 S. Ct. 271, 37 L. Ed. 123; Kern River Co. v. United States, 257 U. S. 147, 155, 42 S. Ct. 60, 66 L. Ed. 175; Ponzi v. Fessenden, 258 U. S. 254, 262, 42 S. Ct. 309, 66 L. Ed. 607, 22 A. L. R. 879, Swift and Co v. United States, 276 U.S. 311, 316-17 (1928).

Congress can, of course, through an unambiguous expression of its intent, reduce the plenary discretion of the Department of Justice in litigation., Swift & Co. v. U.S. 276 U.S. 311, 316-317 (1928), United States v. Hercules, Inc., 961 F. 2d 796, 798-99 (8th Cir. 1992). United State v. International Union of Operating Engineers, 638 F. 2d 1161, 1162 (9th Cir. 1979). However, an unambiguous expression of Congressional intent to limit Department of Justice discretion in settling Quiet Title litigation doesn't exist in FLPMA, in the Quiet Title Act itself, or in the provisions of 28 U.S.C. 516-519.

Without reference to specific federal statutes of which the Department of Justice is in violation, the conclusion must be that it has plenary authority to settle Quiet Title Actions. Elko County argues that the Department of Justice broke no law and acted within the bounds of its authority.

5. The Court Must Rule On What Type Of Interest, If Any, Was Transferred By The Settlement Agreement

The initial claim of Intervenors is that they are entitled to summary judgment under the

Administrative Procedure Act because the Settlement Agreement disposes of federal real property in a way that is not in accordance with applicable law. Based on the content of Intervenors' actual pleadings under the Administrative Procedure Act, the argument of Intervenors presented in its Motion for Summary Judgment, and the prior decisions of this Court, it is not possible to discern whether Intervenors are requesting an order of this Court that will void the Consent Decree, including the Settlement Agreement in its entirety, or partially, and if partially, what parts.

In its Order regarding the threshold legal issues (DKT 507), the Court at page 8, stated that it would need to resolve the parties' apparent disagreement over what, if anything, the United States agreed to relinquish with respect to the South Canyon Road. The August 16, 2016, Order does not appear to contain any language that addresses that issue.

Both Elko County and the United States agree that the Settlement Agreement was not intended to and did not relinquish federal ownership of an easement to Elko County, and that neither party would claim or act as if the agreement did relinquish an easement to Elko County. The Common law, virtually without exception, provides that the intent of the parties to a contract controls its interpretation. Beta Sys. Inc. v. United States, 838 F.2d 1179, 1185 (Fed. Cir. 1988), Firestone Tire & Rubber Co. v. United States, 444 F.2d 547, 551, 195 Ct. Cl. 21 (Ct. Cl. 1971), Alvin, Ltd. v. United States Postal Service, 816 F.2d 1562, 1565 (Fed. Cir. 1987), Imprimis Investors LLC v. United States, 83 Fed. Cl. 46 (2008).

Elko County's position has been that the language of the Settlement Agreement was deliberately made ambiguous by the parties concerning whether an R.S. 2477 easement existed, but that ambiguity was never intended by either side to contractually obligate the United States to concede Elko owned an R.S. 2477 right of way in the South Canyon, nor Elko County to concede the Jarbidge South Canyon Road was not an R.S. 2477 right-of-way. Elko County understands that the decisions of this Court, without actually specifically stating the conclusion, effectively hold that the United States violated federal law by entering into the Settlement Agreement with Elko County because a federal real property interest was transferred or relinquished to Elko County and the Department of Justice lacked the discretion to make that agreement.

6. Disclaimer

Judge Hagen and Judge Hunt (DKT #118 and #186) as well as Intervenors, (Points and Authorities in Opposition to the United States Motion to Dismiss its Cross-Claims (DKT #156 at page 19)) have previously concluded that the Settlement Agreement was not a disclaimer. Likewise, the United States has characterized the Settlement Agreement as a disclaimer. Elko County will not further argue that the Settlement Agreement amounted to a disclaimer.

SUMMARY

As the case is presently procedurally structured, Elko County has no legal argument available to oppose the Court granting summary judgment to TWS' Quiet Title Counterclaim. Elko has requested the Court to consider the impact of the intent of the parties to the Settlement Agreement on whether the Agreement actually relinquishes a federal property right, as well as the impact on the Department of Justice's discretion in settling claims. The scope of the Court's order in granting summary judgment will have a dramatic effect on Elko County's rights and liabilities.

Elko's understanding is that the Court has implicitly found the Settlement Agreement between the United States and Elko County illegally transferred or relinquished a property right owned by the federal government to Elko County and that it will not approve a Consent Decree that incorporates the Settlement Agreement. The Court has specifically held that Elko County cannot prove that it owned an R.S. 2477 easement for the Jarbidge South Canyon Road, but has done so without reconciling that finding with the holdings of Great Old Broads for Wilderness v. Kimbell, 709 F.3d 836 (9th Cir. 2013).

Although the Court has not yet specifically held that the Department of Justice acted arbitrarily and capriciously in entering into the Settlement Agreement, it has found the Department of Justice was wrong in its evaluation of the quantity and quality of Elko County's evidence of ownership of an easement. Under this interpretation, the Department of Justice either didn't know the statutory and constitutional law, or it was wrong in its analysis of the law governing its powers to settle lawsuits, or it alternatively failed to understand that the language of the Settlement Agreement could only be construed as relinquishing title to federal property to Elko County.

Dated this 31st day of January, 2017.

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CERTIFICATE OF SERVICE

I hereby certify, that on the 31st day of January, 2017, a true and correct copy of the foregoing, **RESPONSE TO MOTION FOR SUMMARY JUDGMENT** was served on the following persons by e-filing and by delivery to:

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